

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:

PROPPANT SPECIALISTS, LLC,

EMPLOYER,

-and-

CASE NO. 30-RC-6783

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 139, AFL-CIO,

PETITIONER.

**BRIEF IN SUPPORT OF EMPLOYER'S EXCEPTIONS TO THE HEARING
OFFICER'S REPORT ON CHALLENGED BALLOTS AND
OBJECTIONS WITH RECOMMENDATIONS**

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Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Proppant Specialists, LLC ("Proppant" or the "Employer") files its exceptions to the Hearing Officer's Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election with Findings and Recommendations issued by Hearing Officer Andrew S. Gollin on November 3, 2011, and hereby submits this brief in support of its exceptions.

I. STATEMENT OF THE CASE

On June 9, 2011,¹ a representation election was held at the facility of Proppant Specialists, LLC ("Proppant" or the "Company") in Oakdale, Wisconsin. Of approximately 19 eligible voters, 8 cast ballots in favor of union representation by International Union of

¹ All dates herein are 2011 unless otherwise indicated.

Operating Engineers, Local 139, AFL-CIO (“Petitioner” or “the Union”); 7 cast ballots against. There were four challenged ballots, but only three are at issue.²

On June 16, Proppant timely filed Employer’s Objections (“Objections”). The Petitioner did not file any objections to the election. Additionally, on June 22, Proppant timely filed Employer’s Challenges and Evidence in Support of Challenges. The Employer challenged the ballot of Barrett Oliver, contending that he is a statutory supervisor. The Petitioner challenged the ballots of Todd Rainey and Ralea Rainey. The Petitioner claimed Todd Rainey is a statutory supervisor. The Petitioner also claimed Ralea Rainey is an office clerical employee, who should be excluded from the stipulated unit.

On August 17, the National Labor Relations Board (“NLRB” or “Board”), Region 30, issued a Notice of Hearing on Employer’s Objections to Conduct Affecting the Results of the Election and Challenged Ballots. A hearing was held on August 30, before Hearing Officer Andrew S. Gollin.

On November 3, Hearing Officer Gollin issued his Hearing Officer’s Report on Challenged Ballots and Objections to Conduct Affecting the Results of the Election with Findings and Recommendations (“Report”), recommending Barrett Oliver be included in the unit as an eligible employee; Todd Rainey be included in the unit as an eligible employee; Ralea Rainey be excluded from the unit as an office clerical; and that the Employer’s Objections be

² The four challenged ballots are for: Barrett Oliver, Todd Rainey, Ralea Rainey, and Burdette (“Bart”) Billings. As noted by the August 17, 2011 Notice of Hearing on Employer’s Objections to Conduct Affecting the Results of the Election and Challenged Ballots, the Board Agent conducting the election challenged the ballot of Billings because his name was not listed on the *Excelsior* list provided to the Region by the Employer in advance of the election. Billings filed an unfair labor practice charge against the Employer in Case 30-CA-18986 on May 18, 2011. Billings alleged he was discriminatorily terminated because of his union and/or protected concerted activities. Billings contemporaneously filed a charge alleging discriminatory termination with the Mine Safety and Health Administration. The Regional Director held Billings’ unfair labor practice charge in abeyance because of a petition for temporary reinstatement of Billings filed by the Solicitor of Labor with the Federal Mine Safety and Health Review Commission Office of Administrative Law Judges. The Regional Director further directed the Hearing Officer not to consider evidence on the subject of Billings’ challenged ballot. As a result, the parties did not present, and the Hearing Officer did not make, any findings, conclusions, or recommendations regarding Billings’ challenged ballot. (Report 1-2, n.1.)

overruled in their entirety. The Employer agrees with the Report as to Todd Rainey and hereby files its exceptions to the recommendations regarding Oliver, Ralea Rainey, and all objections it raised.

II. THE EMPLOYER EXCEPTIONS TO THE HEARING OFFICER'S REPORT

The Employer filed one Challenge and the Union filed two Challenges to the June 9 election. The Employer's exceptions to the challenges are as follows:

- I. The Union's Challenge of Ralea Rainey should be overruled and the Hearing Officer's Report overruled because Ralea Rainey is a Plant Clerical employee and an eligible voter.
- II. The Employer's Challenge of Barrett Oliver should be sustained and the Hearing Officer's Report overruled because Barrett Oliver is a statutory supervisor and not an eligible voter.

The Employer filed three Objections to the June 9 election. The Petitioner did not file Objections. The Hearing Officer's Report denying all three Employer's Objections should be overruled. The Employer's Objections are as follows:

OBJECTION 1: During the critical pre-election period, a statutory supervisor, Barrett Oliver, coerced eligible voters into supporting the International Union of Operating Engineers, Local 139, AFL-CIO (hereinafter "Local 139") and/or interfered with eligible voters' freedom of choice by: (1) making and posting repeated statements in support of the union; (2) telling, and posting literature, which stated to employees that they needed a union and promising employees benefits if they voted for the union; (3) predicting that he and the Union would be "running this place" as soon as the Union won the election; (4) acting as an Observer for the Union at the election held on June 9, 2011; (5) using his position to threaten

voters' job security; and (6) engaging in other coercive conduct and conduct that tended to interfere with the employees' ability to exercise a free and reasoned choice in the election.

OBJECTION 2: During the actual voting period, Local 139 coerced eligible voters and otherwise destroyed the "laboratory conditions" necessary for a fair election by electioneering in the voting area, by having a statutory supervisor, Barrett Oliver, wear a Local 139 hat and a Local 139 T-shirt, while acting as the Election Observer for the Union.

OBJECTION 3: During the actual voting period, Local 139 coerced eligible voters and otherwise destroyed the "laboratory conditions" necessary for a fair election by electioneering in the voting area and creating the impression of surveillance in the voting area, by the prominent display of extremely large yard signs at a private residence directly across the street from the polling place, with the confusing and vague statement on the sign that the "Community Supports Local 139."

III. THE EMPLOYER'S POSITION

The Hearing Officer erred in recommending the Petitioner's Challenge of Ralea Rainey should be sustained, the Employer's Challenge of Barrett Oliver should be overruled, and the Employer's Objections should be overruled.

Ralea Rainey is a plant clerical employee who should be included in the unit of eligible employees. The Board has long distinguished between "office clerical" and "plant clerical" employees for the purposes of determining voter eligibility. *Hamilton Halter Co.*, 270 NLRB 331 (1984). In determining whether an employee is a "plant" or "office" clerical, the Board generally focuses on the relationship between the employee's duties and the production process, as well as the amount of time spent with production employees or on the production floor. Typical plant clerical duties are timecard collection; transcription of sales orders to forms,

to facilitate production; maintenance of inventories; and ordering supplies. *Kroger Co.*, 342 NLRB 202 (2004); *see also Caesars Tahoe*, 337 NLRB 1096 (2002); and *Hamilton Halter Co.*, 270 NLRB 331 (1984). In contrast, typical office clerical duties are billing, payroll, phone, and mail. *Dunham's Athleisure Corp.*, 311 NLRB 975 (1993); *see also Mitchellace, Inc.*, 314 NLRB 536 (1994); *Virginia Mfg. Co.*, 311 NLRB 992 (1993); and *PECO Energy Co.*, 322 NLRB 1074 (1997).

Ms. Rainey is presently classified as a "Sand Plant Operator," a classification she has held since Proppant hired her on February 7, 2011. In addition to those duties, she completes bills of lading for trucks that ship sand to the rail yard, and she interacts on a daily basis with workers in the Wet and Dry Plants. Only on a temporary basis does she fulfill duties that are not customarily those of a Sand Plant Operator. Accordingly, Ms. Rainey is a plant clerical employee who is properly included among the eligible voters. Therefore, the Union's Challenge of Ms. Rainey, as well as the Hearing Officer's Report, should be overruled.

Barrett Oliver is a statutory supervisor who should not be included in the unit of eligible employees. As set forth in the National Labor Relations Act (the "Act"), the term "supervisor" means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11).

Oliver supervises and directs employees on a nightly basis. He assigns employees to complete work tasks. He dismisses employees from their regularly scheduled shifts, as he

deems necessary. He adjusts equipment throughout his shift, and he authorizes the release of out-of-compliance shipments. Oliver fulfills all of these supervisory responsibilities without guidance or oversight from any higher-ranked employee. As such, Oliver meets the Board criteria for supervisory status. Therefore, the Employer's Challenge of Oliver should be sustained and the Hearing Officer's Report overruled.

The Hearing Officer also erred when he overruled each of the Employer's Objections. In election proceedings, "it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). The test of whether laboratory conditions are tainted is an objective one. As the Hearing Officer explained, "[t]he objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election." Report, at 54, citing *Delta Brands*, 344 NLRB 252, 253 (2005).

Contrary to the finding of the Hearing Officer, the requisite "laboratory conditions" were unacceptably tainted through the conduct of statutory supervisor Barrett Oliver, the Petitioner's election observer. Oliver could not serve as Petitioner's election observer because he is a statutory supervisor. Alternatively, Oliver is at least an individual closely identified with management by the eligible employees, and he likewise cannot serve as an election observer without adversely influencing employee free choice. Additionally, Oliver, as a statutory supervisor and one closely identified with management, engaged in a series of actions leading up to the election that interfered with the free choice of employees and destroyed the requisite laboratory conditions for a fair election.

Moreover, the propaganda placed in the employees' view suggesting strong community support shortly before polling coercively affected the free choice of eligible employees. An unmistakably apparent, large sign placed in the view of employees entering the facility on the day of the election served as last-minute, impermissible electioneering on the part of Petitioner. The full coercive effects of this electioneering are only fully appreciated by reference to the surrounding community circumstances over the Employer's facility. When the totality of circumstances is considered, the reasonable conclusion is that employees were not given an opportunity to truly exercise free choice. A reasonable attempt to obtain anything close to laboratory conditions was lost, persuasively calling for the election to be set aside.

IV. STATEMENT OF FACTS

On April 28, 2011, Operating Engineers Local 139 filed a representation petition seeking an election at the Company's facility in Oakdale, Wisconsin. (Hearing Officer's Report ("Report") 1.) Allan Fogel was the lead organizer. (Hearing Transcript ("Hr'g Tr.") 29:10-11.) An election was held on June 9, 2011, in accordance with the Stipulated Election Agreement signed May 9, 2011. (Bd. Ex. 1(a).)

A. Proppant's Oakdale, Wisconsin Facility

Proppant operates a sand manufacturing facility in Oakdale, Wisconsin. (Report 4.) The Oakdale location consists of four buildings: a Wet Plant, a Dry Plant, a Shop Area, and the Office. Rather than mining at the location, raw sand is brought to the facility for processing. (Report 4.) Processing at the Oakdale facility begins when the raw product is taken to the Wet Plant. (Report 4.) The raw sand is cleaned and separated by grade at the Wet Plant. (Report 4.) A large rotary dryer within the Dry Plant dries the sand after it is processed through the Wet Plant. (Report 5.) After drying, the sand is separated into three different grades: coarse, middle, and

fine. (Report 5.) Once separated, the sand is stored in silos until delivery. (Report 5.) Sand samples are tested at the laboratory next to the Dry Plant. (Report 5.)

The Oakdale facility is operated in two shifts of twelve hours each, running from 6:00 a.m. to 6:00 p.m. (the “AM-PM” or “Day Shift”) and 6:00 p.m. to 6:00 a.m. (the “PM-AM” or “Night Shift”). (Report 6.) During the Day Shift, the Employer typically staffs one Loader Operator, one Operator, and one Utility Person for each Plant, two Lab Technician/Loadout Employees, and one Maintenance Mechanic. (Report 6.) During the Night Shift, the Employer likewise typically schedules one Loader Operator, one Operator, and one Utility Person for each Plant. (Report 6.) However, on the Night Shift the Employer typically only schedules one Laboratory Technician/Loadout Employee and the Maintenance Mechanic is on-call. (Report 6.)

For each shift, the Employer identifies a “Production Supervisor.” (Report 6.) During the critical period, Todd Rainey typically filled this role for the Day Shift and Barrett Oliver typically served this position on the Night Shift. (Report 6.) Since April 2011, Wayne Dailey has been the Acting Plant Manager. (Report 6-7.)

B. Ralea Rainey

Ralea Rainey joined Proppant as a Lab Technician/Loadout Person on or about February 7, 2011. (Report 24.) She worked exclusively in that capacity until April 2011, when she began assisting the officer manager, Bethany McClain. (Report 24.) Ms. Rainey continued working in the office after Ms. McClain’s employment with Proppant ended in April 2011. (Report 24.)

Ms. Rainey’s duties include reviewing production paperwork and compiling a report that details how much each plant produced, the downtime for each, and how many tons were produced and shipped. (Hr’g Tr. 409:5-9.) If she does not receive the information needed for this report, Ms. Rainey will go to each plant to get it. (Hr’g Tr. 410:23-411:3.) In order to

complete her production-related work, Ms. Rainey spends an hour or two each work day communicating with other employees in the Wet and Dry Plants. (Hr'g Tr. 411:25-412:1.)

In addition, Ms. Rainey receives shipments and verifies the accuracy of vendor invoices. (Report 24.) She creates a composite report of all truck shipments of sand and completes a QuickBooks report that shows how many tons of sand shipped, where it shipped, the grade of the sand, and the laboratory analysis for each shipment. (Report 24.) Ms. Rainey completes bills of lading for trucks that ship sand to the rail yard. For every four (4) trucks that will ship to a rail car, Ms. Rainey will compile the weight ticket and testing information, add the destination and purchase order information, and send this information to Proppant's corporate office. (Hr'g Tr. 409:25-410:4.) This information is taken from the trucks before they leave the Oakdale Facility and requires 25% of Ms. Rainey's time (Hr'g Tr. 412:18-19). The bills of ladings that Ms. Rainey prepares are intertwined with the production of sand as these reports were not compiled until the Dry Plant began operating. (Hr'g Tr. 454:20-455:10.)

While Ms. Rainey is responsible for collecting employees' time cards on a weekly basis and sending them to Proppant's corporate office for processing, she does not perform human-resources functions and spends only about one to two percent of her time each day on human-resources paperwork. (Hr'g Tr. 410:5-9; 413:1-10.) Ms. Rainey has limited access to personnel files and does not have a key to open the filing cabinet where they are stored. (Hr'g Tr. 418:9-16.) Since April 2011, Ms. Rainey worked in the lab five (5) or six (6) times. (Hr'g Tr. 414:24.)

C. Barrett Oliver

Barrett Oliver ("Oliver") began working for Proppant in April 2010, as an Operator and Loader in Proppant's Wet Plant on the Night Shift. (Report 7.) He remained in this capacity until January 28, 2011, when he was promoted to Crew Leader (Report 8). Thereafter,

Oliver was designated as the person in charge on the Night Shift. (Hr’g Tr. 50:3-5.) His responsibilities are to “keep the operations running.” (Hr’g Tr. 51:18.) Oliver identifies himself as the nighttime supervisor (Hr’g Tr. 305:11-20), and employees consider him to be the one running the Night Shift. (473:22-25.)³

In this capacity, Oliver has the authority to make decisions on the Night Shift. (Hr’g Tr. 50:3-5; 51:7-10.) He issues assignments to employees who are on duty during that shift. (Hr’g Tr. 204:9-13, 231:9-11, and 233:9-13.) He gives instructions to employees. (Hr’g Tr. 263:18-20.) He assigns employees to particular tasks. (Hr’g Tr. 473:16-477:7.) He takes the lead and directs employees when something needs to be done. (Hr’g Tr. 588:6-8.) He supervises employees’ work and checks on their progress. (Hr’g Tr. 295-301; 476:24-25.) When equipment breaks, Oliver decides whether to have employees repair the problem or shut down the plant. (Hr’g Tr. 264; 283:2-10.) He uses his authority to release truckloads of sand that test below Proppant’s standard for coarseness. (Hr’g Tr. 237:10-238:4, 366:12-13, and 588:19-591:12.)

In short, Oliver engages in the assignment, supervision, and dismissal of employees with independent judgment and discretion, and without the need to check with higher-ranked employees before doing so. (Hr’g Tr. 52:25-53:2.)

D. Todd Rainey

Todd Rainey was hired by Proppant in March 2011. (Report 19.) Before his hiring, Mr. Rainey was a subcontractor and had never worked in mining, on a loader, or in the Wet or Dry Plant. (Hr’g Tr. 402:7-16; 721:5-9.) He received training from Oliver and Mike Rizzo. (Hr’g Tr. 403:2-5.) In April 2011, Mr. Rainey began training as a Crew Leader, a process that lasted several months. (Report 19.) He has worked primarily on the Day Shift. (Report 19.)

³ During the crucial period, Oliver worked the Night Shift. After the election, he moved to the day shift. The Hearing Officer’s Report is limited to the period prior to the election.

Mr. Rainey's principal duty is to ensure that employees on his shift get their work done. (Report 20.) However, he is also involved with interviewing prospective employees and making recommendations regarding disciplinary issues. (Report 20.) In addition, Mr. Rainey has been preparing a monthly work schedule for both shifts since Proppant implemented a written schedule in April 2011. (Report 20.) Mr. Rainey has received input on the scheduling from Oliver and Wayne Dailey, the Acting Plant Manager. (Hr'g Tr. 317:22-318:13.) Particularly as to the Night Shift, Mr. Rainey would have no idea where to place employees but for suggestions from Oliver. (Hr'g Tr. 319:1-6; 322:3-323:9; 323:20-324:1.)

E. Oliver's Pre-Election Conduct and Communications with Night Shift Employees

Prior to the election, Oliver took advantage of his position with the Employer and engaged in a pattern of conduct designed to coerce employees into voting for Petitioner. While the Night Shift Supervisor, Oliver hung pro-union signs in the Oakdale Facility. (Hr'g Tr. 206:19-207:15.) Rebecca Campobello ("Campobello"), who saw Oliver hanging the propaganda, testified that she did not believe she could take them down because of Oliver's position as the Night Shift Supervisor. (Hr'g Tr. 207:13-15.)

Campobello also became the unwilling target of Oliver's campaign on behalf of the Petitioner. Campobello recalled that Oliver stated,

If we don't vote union, we are all going to be sorry that we don't vote union. We are never going to get more money if we don't go the – if we don't vote the union. The union is going to do so much for us, that we should look into it. He also stated that – **now that it's went this far, that if we don't vote for the union, there's a good possibility that we probably all lose our jobs.**

(Hr'g Tr. 210:11-20 (emphasis added).) After hearing Oliver's statements, Campobello felt harassed by Oliver (Hr'g Tr. 212:12-14) and feared for her job (*see* Hr'g Tr. 212:17-20) because "every time you turned around [Oliver was] throwing the union in your face" (Hr'g Tr. 212:24-

213:4). Oliver also repeatedly pressed Campobello to sign a card for the union. (Hr’g Tr. 216:4-22.)

Other employees substantiated Campobello’s description of pervasive politicking by Oliver and how he took advantage of the opportunities he had as Night Shift Supervisor to address employees with his pro-union views. Robert St. Clair (“St. Clair”) testified that in pre-work meetings, Oliver discussed the union. (Hr’g Tr. 265:19-266:2.) St. Clair described,

Barrett talked to me about voting for the union, and what the benefits would be, and also Jeff [Sobczak] was there because, like I said, we – basically it was a small crew on nights at the time, and Barrett would talk about how the union was going to be a benefit to come in there.

(Hr’g Tr. 270:10-17.) Like Campobello, Oliver continued to approach St. Clair repeatedly during a single shift to talk about his family history with the Union and otherwise solicit St. Clair’s support for the Union. (Hr’g Tr. 281:9-17.) Similarly, Ethan Kogutkiewicz (“Kogutkiewicz”) testified about specific conversations he had with Oliver where Oliver suggested union representation would mean higher pay. (Hr’g Tr. 477:22-23.)

Oliver also carried a handheld digital recorder and turned it on during many work days in the critical period. (Hr’g Tr. 739:19-25; 746:18-747:6.) An atmosphere of surveillance spread to others. Robert Shaw (“Shaw”) testified that he informed Oliver that he created digital recordings of conversations he had at the Oakdale Facility to “protect himself.” (Hr’g Tr. 777:12-19; 781:5-7.) Fogel testified that he received tape recordings of conversations from multiple employees. (Hr’g Tr. 495:20-496:12.)

F. Petitioner Placed Signs Across from the Polling Place Stating Community Support for the Union

The day before the election, two signs appeared across the street from the polling place and were visible to employees as they approached the voting area. (Hr’g Tr. 702:22-711:1;

Employer Ex. 10.) These signs were put up by a union representative, Fogel. (Hr’g Tr. 511:6-11.) A large sign read, “The Community Supports Local 139” while a second sign stated “Vote Yes.” (Employer Ex. 10.) Employee descriptions of these signs did not deviate from the theme of community support for the union. These signs were the “first thing” employees saw when going to vote. (Hr’g Tr. 266:6-11. *See also* Hr’g Tr. 711:5-8.) Additionally, employees testified to seeing union representative Fogel and Burdette “Bart” Billings standing in the vicinity of these signs. (Hr’g Tr. 218:9.)

This atmosphere of surveillance otherwise continued on the election day when Billings, Travis Fries, and Mark Gauf were seen waiting in the parking lot watching employees enter and exit the polling place. (Hr’g Tr. 272:10-19.) Billings is a former employee of Proppant, Fries is a current employee of Proppant, and Gauf is a union representative.

The signs of “community support” did not exist in a vacuum. Proppant employees were aware of an ongoing dispute including calls by community members to reduce the Oakdale facility’s operations on the Night Shift. St. Clair interpreted the sign in the context of his perception that the community was “already upset with Proppant because of the trucks.” (Hr’g Tr. 267:13-14.) Harold Burdett testified to a prevalent fear expressed by all employees of a reduction in hours (Hr’g Tr. 182) and his own concern that Petitioner’s success in representation would result in reduced number of trucks coming to the Oakdale facility (184:11-24). In fact, seeing the signs left St. Clair with the related impression that if the community already wanted to limit the trucks and if the community was for the union, then his check would suffer. (Hr’g Tr. 268:14-19.)

G. Oliver Serves as Petitioner’s Election Observer

Leading up to the election, the Petitioner designated Oliver as its election observer. The NLRB representative overseeing the election cautioned the Union that the

Employer was objecting to Oliver's role as the Petitioner's election observer. (Hr'g Tr. 510:17-511:5; 700:1-2.) The NLRB agent also read off of a paper from his supervisor that the Petitioner might want to reconsider Oliver as its representative. (Hr'g Tr. 177:24-176:10; 700:1-7.) Despite the Employer's objection and the advice of the NLRB representative, Oliver remained in the role of election observer. (Hr'g Tr. 510:17-511:5; 699:21-23.)

Additionally, employees took note of Oliver's attire when he served as Petitioner's election observer. (*E.g.*, Hr'g Tr. 272:23.) While serving as the election observer, Oliver wore a shirt that stated "Local 139" on his chest. (Hr'g Tr. 187.) Oliver also wore a "Local 139" hat. (Hr'g Tr. 188.)

V. EMPLOYER'S ARGUMENTS IN SUPPORT OF CHALLENGES

A. **Ralea Rainey is a Plant Clerical Who Should Be Included in the Unit of Eligible Employees**

Proppant submits that Ms. Rainey is an eligible voter, and that her challenged ballot should be opened and counted. Ms. Rainey is presently classified as a "Sand Plant Operator," a classification she has held since Proppant hired her on February 7, 2011. Some of the individuals in this position are commonly referred to as Lab/Loadout Operators. All of these individuals (Duane Arendt, Campobello, Todd Gebhardt, and Jennifer Stanley) were included on the *Excelsior* List and were not challenged at the election. The Union provided no reason for this challenge, other than to state at the pre-election conference, through one of its agents, that Ms. Rainey was an "office clerical."

Ms. Rainey has been working on a temporary basis on production tasks outside of the sand lab. Along with Campobello and others, Ms. Rainey has undertaken such tasks on a "stop-gap" basis since the unexpected resignation of another production clerk, Bethany McLain, on April 26, 2011.

Typical plant clerical duties are timecard collection; transcription of sales orders to forms, to facilitate production; maintenance of inventories; and ordering supplies. *Kroger Co.*, 342 NLRB 202 (2004); *see also Caesars Tahoe*, 337 NLRB 1096 (2002); and *Hamilton Halter Co.*, 270 NLRB 331 (1984). In contrast, typical office clerical duties are billing, payroll, phone, and mail. *Dunham's Athleisure Corp.*, 311 NLRB 975 (1993); *see also Mitchellace, Inc.*, 314 NLRB 536 (1994); *Virginia Mfg. Co.*, 311 NLRB 992 (1993); and *PECO Energy Co.*, 322 NLRB 1074 (1997).

The Board has long distinguished between “office clerical” and “plant clerical” employees for purposes of determining voter eligibility. *Hamilton Halter Co.*, 270 NLRB 331 (1984). In determining whether an employee is a “plant” or “office” clerical, the Board generally focuses on the relationship between the employee’s duties and the production process, as well as the amount of time spent with production employees or on the production floor.

Employees who spend most or all of their time in an office area, or those who primarily perform secretarial, paperwork or other general office functions, typically are classified as office clericals. *See, e.g., Weldon Int'l*, 321 NLRB 733 (1996); *Virginia Mfg. Co.*, 311 NLRB 992 (1993); and *Dunham's Athleisure Corp.*, 311 NLRB 975 (1993). Conversely, employees who spend the majority of their time on the plant floor, or those who perform non-office, production-related functions typically will be found to be plant clericals. *Hamilton Halter Co.*, 270 NLRB 331 (1984); *see also American Optical Corp.*, 236 NLRB 1046 (1978).

Whether a plant clerical employee is eligible to vote as part of an eligible bargaining unit should be analyzed based on the employee’s permanent position, particularly where the employee is temporarily reassigned to cover for another employee’s absence.

In *First Legal Support Serv.*, 342 NLRB 350 n.3, 367 (2004), the Board adopted an administrative law judge's decision addressing the eligibility of a courier who temporarily filled in as an in-house coordinator. *Id.* at 367. The courier was reassigned for two (2) months, during which the union conducted an organizing drive and attempted to organize the couriers but not the in-house employees. *Id.* The administrative law judge agreed with the union that the employee was eligible for the courier bargaining unit, even though he had worked as an in-house employee at the time of the organizing drive, because "his was clearly a temporary assignment, and the obvious expectancy was that he would return to his normal driving duties when [the replaced employee returned]." *Id.* See also *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1171-72 (D.C. Cir. 1993) (excluding from a bargaining unit replacement employees brought in temporarily from the employer's second store).

Ms. Rainey is a Sand Plant Operator who fulfills the duties of that position on a daily basis. Campobello worked with Ms. Rainey in the lab prior to the election. At that time, Ms. Rainey loaded trucks and completed sieve analyses four (4) or five (5) days per week. (Hr'g Tr. 219). Since April, Ms. Rainey has filled in about five (5) or six (6) times in the lab. (Hr'g Tr. 220).

In addition, Ms. Rainey completes bills of lading for trucks that ship sand to the rail yard. For every four (4) trucks that will ship to a rail car, Ms. Rainey will compile the weight ticket and testing information, add the destination and purchase order information, and sends all of it to Proppant's corporate office. (Hr'g Tr. 409:25-410:4.) Ms. Rainey testified that, if needed, she will,

put my hard hat and safety glasses on, and jump in my truck or walk, and go down to the dry plant or wet plant and get the information. Also, if it's missing any information – sometimes they forget to write down tons produced or what their downtime

was – I'll go down and get that information so I have it for the report.

(Hr'g Tr. 410:23-411:3.) These reports are an integral part of the production process as they allow Proppant to track and invoice the sand shipped from the Oakdale Facility. Their importance and necessity to the sand production process is highlighted by the fact that Proppant did not create these reports until the Dry Plant was in operation and sand could be shipped. (Hr'g Tr. 454:20-455:10.)

Ms. Rainey interacts on a daily basis with workers in the wet and dry plants. She testified: "If I'm not down at the plants, I have a two-way radio that I can communicate with them and ask questions. If a pallet of something comes in on a truck, I can't unload it, I need a fork truck, I may have them ask someone to come unload that for us." (Hr'g Tr. 411:15-412:1.) Ms. Rainey testified that on an average day, she will spend an hour or two communicating with employees in the two plants. (Hr'g Tr. 411:15-412:1.) She further testified that:

My day starts off [with] the production information, and I would say that takes 20 to 25 percent of my time in a day. Receiving takes place throughout the day. Whenever UPS, FedEx, a trucking company, anybody comes in, that part would be, you know, could be 5 to 10 percent, depending on what we have coming in that day. Once the mail comes in, going through the mail, opening it up, putting the receipts, the receipt tickets we have with the bill, getting all that ready to go to corporate is probably 35 to 40 percent of the day. Bill of lading takes up, I don't know, 20, 25 percent. That's time-consuming.

(Hr'g Tr. 412:10-19.)

Further, Ms. Rainey spends only one to two percent of her daily time on human-resources paperwork, and typing constitutes only about one percent of her time. (Hr'g Tr. 413:1-10.) Ms. Rainey does not perform human-resources functions. Rather, she simply sends

paperwork to Proppant's corporate office. (Hr'g Tr. 410:5-9.) She spends 30 minutes every three (3) or four (4) weeks typing out Proppant's work schedule. (Hr'g Tr. 412:11-21.)

In April 2011, Ms. Rainey's day was similar to the description above, except that she was working in the lab. She was hired as a Sand Plant Operator (Hr'g Tr. 417. *See also* Employer Ex. 8) and worked in the lab until Proppant terminated McLain's employment on or about April 26. (Hr'g Tr. 414:11-18.) Since, then, Ms. Rainey has worked in the lab five (5) or six (6) times. (Hr'g Tr. 414:24.) Moreover, Ms. Rainey has limited access to personnel files and does not have a key to open the filing cabinet where they are stored. (Hr'g Tr. 418:9-16.)

Ms. Rainey is a plant clerical employee who is properly included among eligible voters. Only on a temporary basis does she fulfill duties that are not customarily those of a Sand Plant Operator.⁴ As set forth in *First Legal Support Services*, where an employee is fulfilling the responsibilities of another position on a temporary position, the employee's permanent position is properly considered for the purposes of determining bargaining-unit eligibility. As Ms. Rainey's permanent position is Sand Plant Operator, which is a part of the proper unit as a plant clerical position, her vote should be opened and counted.

B. Barrett Oliver is a Statutory Supervisor Who Should Not Be Included in the Unit of Eligible Employees

The term "supervisor" means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

⁴ Work performed by Ms. Rainey after the election date of June 9, 2011, is irrelevant and should be disregarded, as the Board generally does not determine eligibility based on events that occur after an election. *See NLRB Case Handling Manual* § 23-110.

authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” § 2(11) of the Act.

The Board test for determining supervisory status is:

1. whether the employee has the authority to engage in any one of the twelve criteria listed in Section 2(11) of the Act (above);
2. whether the exercise of such authority requires the use of independent judgment; and
3. whether the employee holds the authority in the interest of the employer.

NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573-74 (1994).

In *Oakwood Healthcare*, 348 NLRB 686 (2006), the National Labor Relations Board (the “Board”) (citing the Supreme Court’s decision in *NLRB v. Kentucky River*, 532 U.S. 706 (2001)), stated that pursuant to Section 2(11):

[I]ndividuals are statutory supervisors if (1) they hold the authority to engage in *any 1* of the 12 supervisory functions (e.g., ‘assign’ and ‘responsibly to direct’) listed in Section 2(11); (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;’ and (3) their authority is held ‘in the interest of the employer.’

348 NLRB at 687 (citing 29 U.S.C. §152(11) (emphasis added)).

1. Oliver possesses the authority to assign work.

The Board has stated that there are several relevant issues regarding supervisory status and the assignment or direction of work. As set forth in the *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings*, those considerations include the following:

- Is the individual the highest-ranking individual present at any time or on any shift?
- Is the individual involved in the assignment or direction of work?

- How is the individual involved in assignments? Are the assignments made in collaboration with others?
- Does the individual makes the decisions; if so, on what factors are those decisions based (skills, availability, seniority, operational needs, etc.)? Does the individual have discretion to determine which among several employees should be assigned to an individual task?
- What is the nature and duration of the assignments given by the individual?
- In the event there is a change in work assignments, can the individual decide how to reassign employees without consulting anyone else?
- Does the individual prioritize work?
- Does the individual direct employees' work?
- Does the individual inspect the work of employees?
- Is the individual held accountable for the performance of the work?

NLRB, *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings*, 101, 105-06 (2003) (hereinafter *NLRB Guide for Hearing Officers*).

The Board has noted that “[t]he assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) *or to certain significant overall tasks* (e.g., restocking shelves), would generally qualify as ‘assign’ within our construction.” *Oakwood Healthcare*, 348 NLRB 689. (emphasis added). As noted in *Oakwood Healthcare*:

If a person on the shop floor has “men under him” and if that person decides “what job shall be undertaken next or who shall do it,” that person is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment.

348 NLRB at 691.

Courts have distinguished “employees” from “supervisors” based on differing responsibilities between day and night shifts. *NLRB v. McCullough Envtl. Serv.*, 5 F.3d 923 (5th Cir. 1993). In *NLRB v. McCullough Envtl. Serv.*, the court determined that “lead operators” fell under the statutory definition of supervisors based on increased responsibilities during non-business hours. *Id.* at 938-43. Although a “project manager” and a “chief operator” outranked

them, lead operators were the highest-ranked individuals at times other than weekdays between 7 a.m. and 5 p.m. *Id.* at 938. Given that the plant had round-the-clock shifts during the week and 12-hour shifts on weekends, the court concluded that a “lead operator is the highest-ranking official on duty at the facility for approximately seventy percent of its operating hours.” *Id.*

The court noted that during non-business hours, lead operators supervised multiple employees; assigned specific tasks; sent employees home when necessary; made “operational decisions” regarding plant equipment, based on their knowledge and experience; and otherwise were held responsible for the operation of the plant. *Id.* at 940-41. While the lead operators could contact superiors in emergency situations, the lead operators possessed the knowledge necessary to handle such circumstances, if necessary. *Id.* at 941-42. In addition, the lead operators lacked supervision outside of weekdays from 7 a.m. to 5 p.m. *Id.* This lack of supervision significantly contributed to the court’s determination that the lead operators were supervisors. *Id.* at 941 n.28.

Oliver possessed the authority to responsibly direct and assign work. Proppant looked to him to run the Night Shift, and employees took their cues from him.

Acting Plant Manager Wayne Dailey testified that he designated Oliver to be the person in charge on the Night Shift. (Hr’g Tr. 50:3-5.) Dailey testified that Oliver’s responsibilities were to “keep the operations running.” (Hr’g Tr. 51:18.) Dailey testified:

His responsibility is to keep the operations running. He makes the decision if the plant had to be shut down and nobody needed to be there, he could let the people go. If some piece was broke down, he needed a mechanic, he would call out Harry (Burdett) to get help.

(Hr’g Tr. 51:18-22.)

Oliver did not have to check with Dailey before doing so. (Hr’g Tr. 52:1-13.) If Oliver sent employees home early, Dailey would not learn of this until he reported for work in

the morning. (Hr'g Tr. 52:22-24.) Proppant expected Oliver to make such decisions without input from anyone else. (Hr'g Tr. 52:25-53:2.)

Campobello, lead Laboratory Technician/Loadout Person, testified that during the evening shift change (about 5:45 p.m.), Oliver would join other employees gathered in the control room of the dry plant and issue assignments to employees who were working the Night Shift. Campobello testified:

And then Barrett was there, and he would give his direction. If there was a list of stuff that needed to be done, he would have that list made up, and then he would direct people where they needed to go and what they needed to do at the – you know, for the Night Shift. ... [W]hen we would go in at night and there would be a list, he would direct everybody where they needed to go and what they needed to do. ... He would tell everybody what to do, and then we would be kind of talking ... and he was, at that time, telling people, directing them, what they needed to do. 'Bart, you need to run the loader tonight.'

(Hr'g Tr. 204:9-13, 231:9-11, 233:9-13.)

In his testimony, Todd Rainey identified Oliver as "the nighttime supervisor for the dry plant. Well, he actually was the nighttime supervisor for both plants." (Hr'g Tr. 305:6-10.) Mr. Rainey testified that during shift changes, he and Oliver would confer about issues or problems, as well as about work that needed to be completed. (Hr'g Tr. 333:6-334:4.) Mr. Rainey testified:

[W]hen we compare notes in the morning, he said, well, the plant's been running good all night. I checked that a little while ago. They're about ready to be finished. Right now, they're greasing the loaders. Loadout went pretty good last night, he would tell me. He would tell me what he had Mark doing in the middle of the night, as far as cleaning up or backhauling. He would tell if there was any maintenance that was done in the dry plant, as far as greasing the bucket elevators or greasing the augers or changing bearings or bushings or anything like that. He would pretty much tell me exactly what they did the entire night, of what he had Bobby do, what he had Bart do, what he had Mark do. If they were down, he

would say he had Mark coming up and helping do the Rotex screens and stuff like that.

(Hr'g Tr. 323:11-24.)

Robert St. Clair, a former operator and loader for Proppant who worked the Night Shift, testified that he received orders from Oliver, and that Oliver would tell him where – or on what equipment – he would be working on a given night. St. Clair said of Oliver:

He would tell me, for instance, if I was going to be on the loader that night, or running the wet plant itself, in the building, and doing the rounds on all the machinery.

(Hr'g Tr. 263:18-20.)

St. Clair testified that he observed Oliver giving instructions to Manpower temporary employees, “just like he did to me.” (Hr'g Tr. 299:22-300:1.) St. Clair recalled that Oliver referred to himself as “supervisor.” (Hr'g Tr. 292:8-293:10.) Oliver generally was the one to inform him if his work assignment was going to differ from what was written on the work schedule. (Hr'g Tr. 295:1-7.)

Kogutkiewicz, a Loader Operator, testified that he viewed Oliver as his supervisor on the Night Shift, and that Oliver would assign – or reassign – him to particular tasks. (Hr'g Tr. 473:16-477:7.) Kogutkiewicz testified:

John Rice, when I was hired, had made it perfectly clear multiple times that at the time when I was hired, Mike Rizzo was the daytime supervisor and Barrett Oliver was the nighttime supervisor.

(Hr'g Tr. 473:22-25.)

Through his regular assignment of work duties to employees, Oliver exercises independent judgment that is done in the interests of Proppant. As such, Oliver satisfies the

criteria of a statutory supervisor. Therefore, the Employer's Challenge of Oliver should be sustained and the Hearing Officer's Report overruled.

2. Oliver exercises independent judgment by reassigning employees to keep the plant running and, at times, sending employees home early.

As the Night Shift Supervisor, Oliver had the authority to use his independent judgment and discretion to reassign employees. The witnesses provided examples of instances in which Oliver invoked his supervisory authority:

During the months of April through June 2011, Dailey designated Oliver to make decisions on the Night Shift. (Hr'g Tr. 50:3-5; 51:7-10.)⁵ Dailey testified that while he makes decisions on the day shift, he is not present at night, and he gave Oliver the authority and responsibility to keep the operation running on the Night Shift. (Hr'g Tr. 50:3-5; 51:7-10.) Oliver had the authority to decide if the plant should be shut down. (Hr'g Tr. 51:16-20.) If Oliver shut down the plant, he had the authority to let people go home. (Hr'g Tr. 51:16-20.) Oliver sent all the employees home before 6 a.m. (the end of the Night Shift) on at least one occasion. (Hr'g Tr. 283:16-22; 582:9-17; 638:15-22.) Oliver made the decision to send employees home independent of Dailey. (Hr'g Tr. 52:22-53:2.) If a piece of equipment needed repair, Oliver had the authority to call Harold Burdett ("Burdett"), the Maintenance Mechanic for Proppant's Oakdale facility. (Hr'g Tr. 51:20-22; 727:1-3.)

Sandra Haskins, a Laboratory Technician/Loadout Person, testified that she reported laboratory problems to Oliver, whom she viewed as her supervisor. (Hr'g Tr. 592:10-22.) She testified that Oliver took the lead and directed employees when something needed to be done. (Hr'g Tr. 588:6-8.)

Kogutkiewicz testified,

⁵ Oliver served in this capacity until his requested transfer to the day shift at the end of June. (Hr'g Tr. 632:4-11; 773:3-5.)

[Oliver] would tell me to get in the loader if somebody is late, didn't show up; I would run [the] loader, even though I was not scheduled to do so. . . . [Oliver] told me to grease, after that he had sent me down to the dry plant and told me to clean, starting at the top level, working my way down. And then, after that . . . he gave me and another person, Bob St. Clair, permission to take the [company] truck. At the time, we were setting up hangers for tire trucks to sit in the parking lot, and we used the truck to go back and forth, hauling from shop.

(Hr'g Tr. 475:7-16.)

Oliver moved Kogutkiewicz to a loader for part of a shift, even though he had been scheduled to run the burner. (Hr'g Tr. 480:17-25.) In addition, Oliver has checked on Kogutkiewicz's progress during the Night Shift. (Hr'g Tr. 476:24-25.)

Mr. Rainey testified that Oliver rotated people around according to their skills. (Hr'g Tr. 312:10-14.)

St. Clair testified about instances in which Oliver supervised his work or reassigned him to perform other tasks. (Hr'g Tr. 295-301.) St. Clair testified that Oliver would instruct him when to continue running a conveyor or when to stop and replace a conveyor belt. (Hr'g Tr. 291:13-22.) Oliver occasionally redirected night-shift employee Chuck Miller from the Wet Plant to the Dry Plant. (Hr'g Tr. 301:5-14.) When equipment broke, St. Clair would report the problem to Oliver or – if Oliver was not there – to the next most-senior person on the shift. (Hr'g Tr. 264:13-22.) When this occurred, Oliver would decide whether to have employees fix the problem or shut down the plant (Hr'g Tr. 264), and St. Clair recalled instances when Oliver informed employees that the facility would be shut down. (Hr'g Tr. 283:2-10.) St. Clair also recalled an instance in which Oliver sent employees home because the facility had run out of sand to process. (Hr'g Tr. 283:17-24.)

By reassigning employees to keep the plant running, or sending employees home early, Oliver exercises independent judgment that is done in the interests of Proppant. As such, Oliver satisfies the criteria of a statutory supervisor. Therefore, the Employer's Challenge of Oliver should be sustained and the Hearing Officer's Report overruled.

3. Oliver exercises independent judgment and discretion by authorizing the release of truckloads of sand that test below the Company's customary cutoff.

Each truckload of sand leaving Proppant's Dry Plant is tested to ensure that it meets a particular grade of coarseness. (Hr'g Tr. 38:8-24; 39:3-14.) Four truckloads make up a rail-car load, and the entire rail car must test at 90% (or higher) for a particular grade of sand. (Hr'g Tr. 205:11-13.) On the Night Shift, Oliver exercised independent judgment and discretion when, on several occasions, he authorized the release of truckloads that tested below the 90% cutoff.

Campobello (Hr'g Tr. 237:10-238:4), Mr. Rainey (Hr'g Tr. 366:12-13), and Haskins (Hr'g Tr. 588:19-591:12) all testified that Oliver made the decision to release truckloads below the 90% cutoff. (*See also* Employers Exs. 9.1 and 9.2.)

Mr. Rainey testified that on typical day in May, he arrived at 5:45 a.m., and Oliver "might tell me that, well, we had a couple of trucks go out last night that were 90 or lower, and I signed off on them." (Hr'g Tr. 366:12-13).

Haskins testified that she sought out and received Oliver's permission to send out sand that was below Proppant's 90% standard. (Hr'g Tr. 588:13-589:6.) She testified that she did not have the authority to do this on her own. *Id.*

In sum, Oliver regularly engages in precisely the type of "assignment ... to certain overall tasks" that was found sufficient to confer supervisory status in *Oakwood Healthcare* and

without the type of other supervision found dispositive in *McCullough*. As described above, Oliver:

- supervises and directs employees on a nightly basis;
- assigns employees to complete work tasks;
- dismisses employees from their regularly scheduled shifts, as necessary;
- authorizes the release of out-of compliance truckloads;
- adjusts equipment throughout his shift, as necessary; and
- fulfills all of these supervisory responsibilities without guidance or oversight from any higher-ranked employee during his Night Shift.

By fulfilling such duties, in the interests of Proppant, Oliver satisfies the criteria of a statutory supervisor. Therefore, the Employer's Challenge of Oliver should be sustained and the Hearing Officer's Report overruled.

4. Oliver was ostensibly the Night Shift Supervisor, and employees reasonably believed that he had such authority.

In addition to evidence that Oliver possessed independent authority and judgment to responsibly direct employees, there is evidence to support the conclusion that Oliver held "ostensible supervisory authority."

"Ostensible or apparent authority can be a basis for making the supervisory determination." *Poly-America, Inc.*, 328 NLRB 667 (1999); *see also SAlA Motor Freight*, 334 NLRB 979 (2001) (where the Board said that "'the test is whether under all the circumstances,' the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management"); *Accord Facchina Constr. Co.*, 343 NLRB 886 (2004); *Ready Mix, Inc.*, 337 NLRB 1189 (2002); *Mid-South Drywall Co.*, 339 NLRB 480 (2002); *D&F Indus.*, 339 NLRB 618 (2002); and *NLRB: An Outline of Law and Procedure in Representation Cases*, § 17-508 (2008) (hereinafter *NLRB Outline*). Among the "secondary

indicia” of supervisory status is whether the individual is “regarded as a supervisor by other employees and admitted supervisors.” *NLRB Guide for Hearing Officers*, at 107.

Despite seeing his name listed on monthly work schedules as the night supervisor, Oliver never complained to Dailey that this was inaccurate. (Hr’g Tr. 668:16-22; *see also* Union Exs. 56-58.) Oliver acknowledged that he referred to himself as a supervisor in conversation with other Proppant employees, managers, and executives. (Hr’g Tr. 692:13-16.)

Burdett testified that when he met him, Oliver was introduced as the Night Shift Supervisor. (Hr’g Tr. 174:24-175:2.) Oliver was customarily the one who called Burdett when plant equipment needed to be repaired. (Hr’g Tr. 175:7-176:7.) Burdett testified that other actions by Oliver also gave him the indication that Oliver was a supervisor:

[Rice] got fired that night over a whole bunch of – I don’t know what, and I don’t care to know. But during all that time, you know, I went back to the house, and after we had determined – we got the dryer squared around and got it running right again. I went back to the house and went back to bed. When I got up the next morning, went to the shop to go to work, the shop was locked. And the shop had never been locked since I had been there. So, you know, I got on the phone, you know, or tried to find somebody that had the keys or find out what the hell was going on, Mr. Oliver came up and unlocked the shop for me. So – it made sense, he’s the supervisor, he’s got the keys to my shop, which I didn’t even have a key for. So I figured well, yeah, he is the supervisor, he would have the keys.

(Hr’g Tr. 180:20-181:8.)

Haskins testified that when an issue arose about the quality of the product being shipped out, she told Campobello that she “took care of it with my night supervisor, Barrett.” (Hr’g Tr. 238:1-4, 592:10-22.)

Mr. Rainey testified that when he met him, Oliver identified himself as the “nighttime supervisor” and informed Mr. Rainey that he would be Mr. Rainey’s supervisor when

Mr. Rainey worked the Night Shift. (Hr'g Tr. 305:11-20.) Oliver unlocked the shop and office for Mr. Rainey, as Oliver apparently was the only individual on the Night Shift with keys. (Hr'g Tr. 308.) Mr. Rainey consulted with Oliver when Mr. Rainey prepared the work schedule. (Hr'g Tr. 317:22-318:13.)

As employees believed that he had the requisite authority, it can be concluded that Oliver held "ostensible supervisory authority." As such, Oliver satisfies the criteria of a statutory supervisor. Therefore, the Employer's Challenge of Oliver should be sustained and the Hearing Officer's Report overruled.

VI. EMPLOYER'S ARGUMENTS IN SUPPORT OF OBJECTIONS

To assure the exercise of free choice by employees, the Board requires that elections are conducted "under conditions nearly ideal as possible." *General Shoe Corp.*, 77 NLRB at 127. Where the necessary "laboratory conditions" for an election are not met, it must be conducted again. *Id.*

The conditions of this election fell far short of any reasonable understanding of "nearly ideal as possible." Rather, Petitioner's and Oliver's misconduct razed the requisite laboratory conditions in several respects. Oliver destroyed the employees' ability to exercise free choice by serving as an observer while also a statutory supervisor. Moreover, Oliver's pre-election conduct harassed employees and prevented the exercise of free choice. Other circumstances likewise constituted impermissible electioneering prior to the election and created an atmosphere of surveillance. The effects of these combined activities cannot be understated and convincingly demonstrate the election should be set aside.

A. The Election Should Be Set Aside Because Barrett Oliver is an Individual Closely Identified with Management Who Ignored the Warning of the Board Agent and Served as Petitioner's Election Observer

Under long-standing Board precedent, supervisors or others closely associated with management may not serve as election observers to insure free and fair elections. *Family Services Agency, San Francisco*, 331 NLRB 850 (2000). These individuals are barred from taking on an observer role no matter whether they act as the observer for the employer or union. *Id.*

Notwithstanding Oliver's status as a supervisor under § 2(11) of the Act, he is at least an individual closely associated with management who should be excluded from serving as an election observer pursuant to *Family Services Agency, San Francisco*. Proppant raised this objection in the *Employer's Objections* filing and on two separate occasions in *Employer's Post-Hearing Brief in Support of Objections to the Conduct of the Election*, Employer Br. at 2, 9.⁶ The Board has not identified a specific set of criteria that one must meet to be an individual who is closely associated with management. The Board has applied this standard to a wide variety of positions, including, but not limited to, a trainer and substitute bus driver, *First Student, Inc.*, 355 NLRB 1 (2010); a personnel clerk or manager, *Mid-Continent Spring Co. of Kentucky*, 273 NLRB 884 (1985); and a compliance/training specialist, *Sunward Materials*, 304 NLRB 780 (1991).

While the Board has not identified a specific set of factors or criteria that must be met, Oliver's position at Proppant is similar to the employee in *B-P Custom Building Products, Inc.*, 251 NLRB 1337 (1980), who was found to be closely associated with management. In *B-P*

⁶ Proppant maintains that it sufficiently alleged this objection before the hearing officer. However, by acknowledging and dismissing this issue without addressing it (Report 57 n.16), the Hearing Officer committed reversible error and ignored evidence received during the hearing that showed the election was tainted. NLRB, *Casehandling Manual Part Two Representation Proceedings* § 11392.11 (2007) citing *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988).

Custom Building Products, Inc., the Board determined the employee at issue was not a supervisor under § 2(11) of the Act. *Id.* at 1338. The Board noted that the employee maintained inventory and scheduled production of particular products, but only made changes to shifts on a routine basis and lacked the authority to hire, fire, lay off, discipline, or transfer employees. *Id.* at 1337-38.

However, the Board sustained objections to the employee acting as an observer because he held “enhanced responsibilities . . . such that he would be considered by the employees as an agent of Respondent” *Id.* at 1338. The Board cited several factors to reach this conclusion, including that the employee was referred to by management as a “supervisor,” spoke at meetings of employees where he relayed information from management to employees, and was placed in a strategic position by management where he could be reasonably viewed as speaking on management’s behalf. *Id.*

Oliver is similar to the prohibited observer in *B-P Custom Building Products, Inc.* because of the enhanced responsibilities he held as the Night Shift Supervisor. Proppant management referred to Oliver as a supervisor to employees through the routine posting of schedules that referred to Oliver as the shift supervisor. (Union Exs. 56-58.) Management also introduced Oliver as a supervisor to other employees when they began at Proppant. (Hr’g Tr. 174:23-175:2.) The smaller number of employees on staff under Oliver’s Night Shift watch should realistically be interpreted to cause employees to consistently believe Oliver relayed information from management to employees and not just at organized meetings.

Oliver was also placed in a strategic position by management where he was reasonably viewed as speaking on management’s behalf. Management gave Oliver the authority to “keep the operations running” on the Night Shift. (Hr’g Tr. 51:18-22.) Proppant designated

Oliver as the responsible party in charge for Mine Safety Health Administration compliance and he accompanied MSHA officials when they came on site (Hr'g Tr. 265:9-18). This role is typically reserved for supervisory positions.

Additionally, and as described above, Oliver routinely exercised independent judgment in his role as Night Shift Supervisor that further demonstrated the strategic position he was placed in by management. Oliver reassigned employees to positions other than those posted on written schedules (e.g. Hr'g Tr. 291:13-22), made strategic decisions regarding equipment maintenance and production (e.g. Hr'g Tr. 264), and even determined when to send all employees home before their shift ended (Hr'g Tr. 283:16-22; 582:9-17; 638:15-22). By all accounts, employees reasonably believed Oliver was a supervisor acting on management's behalf.

No legitimate basis exists to distinguish *Family Services Agency, San Francisco* so that only *statutory supervisors* are excluded from serving as election observers. In *Family Services Agency, San Francisco*, the Board eliminated a distinction between permissible supervisor observers for unions and impermissible supervisor observers for employers so that no supervisors or employees closely identified with management could serve as election observers. 331 NLRB at 850.

As a preliminary matter, the Board described the individual at issue in *Family Services Agency, San Francisco* as “an undisputed statutory supervisor,” 331 NLRB at 851. Whether the rule applied only to supervisors was not at issue for the Board to address. Indeed, the Board's acknowledgment of the rule that “*employers* may not designate supervisors or others closely associated with management as their election observers” without later distinguishing those categories of individuals in announcing a uniform rule that applies to both unions and

employers, *id.*, outright shows that the Board did not intend to distinguish statutory supervisors in this way. Further still, materials published by the Office of the General Counsel do not recognize such a distinction. *NLRB Outline*, at 327. (“It is general Board policy, in the interest of free elections, that persons closely identified with management may not act as observers either for the employer or the union.” (citation omitted)).

Moreover, the same concerns that led the Board to adopt a rule excluding statutory supervisors from taking the role of election observers apply to likewise exclude individuals closely associated with management. In “barring supervisors from serving as observers for any party to an election[.],” the Board cited the need to maintain laboratory conditions “to facilitate expression of the uninhibited desires of the employees.” *Family Service Agency, San Francisco*, 331 NLRB at 850. The Board went on to express its concern

to avoid the possibility that **voters may perceive** the participation of a statutory supervisor in the actual balloting process, even in the limited role of an observer, as calling to question the integrity of the election process[.]

Id. at 851 (emphasis added). Thus, the primary concern in expressly prohibiting a statutory supervisor from acting as an election observer for either the employer or the union was *the perception of the employees* – not the official classification of the individual under the Act.

A Board publication recognizes a close connection between supervisory status and apparent authority when it states, “Ostensible or apparent authority can be a basis for making the supervisory determination.” *NLRB Outline* , at 221. As recently as 2010, in *First Student, Inc.*, the Board cited the reasonable beliefs employees held that an individual closely identified with management could influence their employment as a reason to prohibit that individual from acting as an election observer for the employer. 355 NLRB at 1. These reasonable beliefs raise similar concerns over undue influence employees may believe could occur when presented with

an election observer who is closely identified with management. Undue influence is a special risk where that individual observing took a strong position in the election.

In addition to the influence Oliver's supervisory position at Proppant had on eligible employees, Oliver also wore extensive insignia of the Petitioner while serving as an observer. The wearing of such insignia is discouraged by the Board. *Larkwood Farms*, 178 NLRB 226 (1969). Such insignia is another factor that demonstrates eligible employees did not vote in the laboratory conditions necessary for a fair election. In light of Oliver's position and apparel while serving as an election observer for Petitioner, the laboratory conditions necessary for a fair election were convincingly destroyed so that employees were deprived of the ability to exercise free choice.

B. The Election Should be Set Aside Because Barrett Oliver's Pre-Election Conduct as a Statutory Supervisor Interfered with the Employees' Free Choice in the Election

Oliver prevented a fair election and interfered with the employees' free choice through his pre-election conduct as a supervisory employee. The Board stated the standard to determine whether supervisory prounion conduct interferes with an election in *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004), by reference to two factors:

(1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.

This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engaged in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

As explained above, Oliver was a statutory supervisor with substantial authority over Night Shift employees. His position supports a finding that his conduct unlawfully interfered with the employees' exercise of free choice. Even if the Board concludes that Oliver was not a statutory supervisor, the *Harborside Healthcare, Inc.* analysis does not end there. His conduct is not precluded from unlawfully interfering with the employees' free choice leading up to the election because he maintained some nature and degree of supervisory authority as an individual closely identified with management.

As an individual closely associated with Proppant management and perceived by employees to possess supervisory authority, Oliver's conduct still unlawfully interfered with the employees' exercise of free choice. Whether an individual maintains "supervisory authority" is but one factor scrutinized by the Board to conduct the *Harborside Healthcare, Inc.* analysis. This factor accounts for objectionable conduct exhibited by those who are less than statutory supervisors as it considers "the nature *and degree* of supervisory authority[.]" *Id.* at 909 (emphasis added). Simply limiting the analysis to whether one is a statutory supervisor does not satisfy the Board's standard.

The reasonable belief of employees and Oliver that he was in fact a statutory supervisor under § 2(11) makes his pre-election conduct impermissible for a free and fair election. Employee perceptions of authority are a significant focal point for the Board to determine whether employees exercised free choice in a representation election. In scrutinizing the nature and degree of the individual at issue in *Harborside Healthcare, Inc.*, the Board concluded the individual was a statutory supervisor but noted, "[N]ursing assistants Pavelchak, Thyme, and Jackson *all reasonably perceived* Thomas to be a supervisor with substantial authority." *Id.* at 910 (emphasis added). This analysis demonstrates that *apparent* authority and

employee perception serves a significant role in evaluating pre-election conduct to determine whether a fair election took place.

Further, the Board acknowledges the impermissibly coercive effects that individuals closely identified with management can have on employee free choice in similar contexts. In another organizing case, the Board applied a more liberal “common law principles of agency” standard that considered actual or apparent authority to determine whether the employer violated § 8(a)(1) through statements made by certain employees. *Cooper Hand Tools*, 328 NLRB 145 (1999). The Board explained coercive statements made by employees violated the Act where “the employee is ‘held out as a conduit for transmitting information [from management] to the other employees.’” *Id.* quoting *Debber Electric*, 313 NLRB 1094, 1095 n.6 (1994). Circuit courts have likewise expressed similar sentiments in imposing statements made by non-supervisory employees on an employer. *E.g.*, *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1187 (5th Cir. 1977) (“[A]n employer can be held liable for unfair labor practices committed by a person acting as its agent regardless of the fact that the agent has not been designated a supervisor.”); *General Mercantile & Hardware Co. v. NLRB*, 461 F.2d 952, 955 (8th Cir. 1972) (“We find it unnecessary to decide whether Mr. Wilson was in fact a supervisor since the Company had at least given him the apparent authority of a supervisor by holding him out to the employees as such.”); A strict statutory supervisor is thus not the only individual who can have an unlawful, coercive effect on employee free choice.

Additionally, the Board prohibits those employees who lack statutory supervisory authority but are closely identified with management from serving as election observers for employers *and unions*. *See supra*, Part VI(A). Indeed, the *First Student, Inc.* Board cited the “economic realities” of the workplace in reiterating that an individual reasonably perceived by

employees' to be closely aligned with management could not serve as an election observer without unlawfully interfering with the laboratory conditions necessary for a fair election. 355 NLRB at 2.

These same "economic realities" make abundant pre-election conduct that would otherwise be unlawful by a statutory supervisor, likewise impermissible if engaged in by one who is reasonably perceived by employees to be closely aligned with the employer. If the employees eligible to vote reasonably believe that an individual holds supervisory authority and he or she attempts to coerce employees into voting a certain way, no reasonable attempt is made to achieve the necessary laboratory conditions for employees to exercise free choice. The employees' decisions are subject to the will of the closely-aligned individual who attempts to impart his or her influence on those who reasonably fear retaliation if the ultimate outcome is not to the liking of the individual who is believed to possess supervisory authority. Therefore, Oliver's position as a statutory supervisor or as an individual closely identified with management, *see supra* Parts V(A), VI(A), favors setting aside the election because his pre-election conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.

The nature, extent and context of the Oliver's conduct also weighs in favor of setting aside the election. Oliver repeatedly confronted employees about their choice and his strong opinion in favor of the Union. But Oliver's conduct went beyond mere expression of his opinion. Campobello described how she felt harassed by Oliver's repetitive confrontations. (Hr'g Tr. 212:12-14.)

Moreover, Oliver did not solicit employee support for the union in one or two isolated circumstances. Employees testified that he repeatedly sought card signatures and would

even approach them multiple times in a given shift voicing his support for the union. Oliver's pro-union confrontations were widespread and pervasive. (Hr'g Tr. 187-188; 206:19-207:15; 210:11-20; 212:24-213:4; 216:4-22; 265:19-266:2; 270:10-17; 272:23281:9-17; 477:22-23.) His communications were especially strong to employees because of the relatively small number of personnel on the Night Shift. Oliver easily reached out to all employees under his supervision, which represented a significant number of the overall eligible voters. As management designated Oliver a supervisor, his pro-union message was especially strong when he delivered it to employees.

Oliver's conduct also materially affected the outcome of the election. The margin of victory in the election was small as it currently stands at a difference of one vote. A single vote that could change the results of the election represents only 5% of the eligible electorate. In *Harborside Healthcare, Inc.*, the Board viewed a similar 5% margin (6 of 102 eligible voters) as favorable to a finding that the election was materially affected by the conduct. 343 NLRB at 913. Additionally, the margin of victory reverses to disfavor Petitioner in this case when the Board assumes the unopened, uncounted challenged ballots were cast in favor of the Employer. *Id.* citing *Acme Bus Corp.*, 316 NLRB 274 (1995).

As described above, Oliver's conduct was widespread. The examples given by employees in testimony did not describe isolated instances of pro-union conduct. Oliver repeatedly and consistently delivered a strong, pro-union message to employees while the Night Shift Supervisor. Similarly, the timing of the conduct demonstrates the effect Oliver had on the exercise of free choice. Oliver's conduct began in April (Hr'g Tr. 209:3-5) and lasted through the time that employees entered the polling booth. In *Harborside Healthcare, Inc.*, the Board found conduct that began just two weeks before the election to support a finding that it materially

affected the election outcome. *Id.* at 913. Here, Oliver's long lasting conduct that lasted up to the time of voting also favors setting aside the election.

Additionally, Oliver's conduct became well-known and had a lingering effect. Several employees testified to Oliver's pro-union politicking with employees. The small staff size of the Night Shift cannot be discounted and strongly suggests that Oliver's illicit conduct quickly became well-known to all employees. The Board may infer knowledge on others where the number of employees in the workplace is small. *See D&D Distrib. Co. v. NLRB*, 801 F.2d 636, 641 (3d Cir. 1986). The effects of Oliver's conduct were long lasting when he told employees they could expect to lose their jobs if they did not vote for the union. (Hr'g Tr. 210:11-20.) Like the supervisor at issue in *Harborside Healthcare, Inc.*, Oliver's tactics were extensive, persistent, badgering, harassing, and intimidating in nature.

The *Harborside Healthcare, Inc.* analysis demonstrates the election should be set aside due to Oliver's pre-election conduct. No conduct on the part of the Employer can be found to mitigate Oliver's conduct as the Petitioner did not file any objections to the election. Thus, the election should be set aside.

C. The Election Should be Set Aside Because the Petitioner's Signs and the Atmosphere of Surveillance that Arose through Petitioner's Conduct Interfered with the Employees' Free Choice

The Board evaluates the presence of propaganda that infringes the laboratory conditions of an election through reference to factors similar to those considered under *General Shoe*. These factors include:

[(1)] the nature and extent of the electioneering, [(2)] whether it was conducted by a party to the election or by employees, [(3)] whether it was conducted in a designated 'no electioneering' area, and [(4)] whether it was contrary to the instructions of the Board agent.

Pearson Education, Inc., 336 NLRB 979 (2001) citing *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-19 (1982), *enfd.* 703 F.2d 876 (5th Cir. 1983). These factors led the Board to determine that a two foot by three foot poster hung in an area that was not formally designated a “no electioneering” area but where employees had to pass near to vote was objectionable. *See also United Aircraft Corp.*, 103 NLRB 102 (1953) (telegram distributed to voting employees by union near plant two days before election caused election to be set aside).

The Board also prohibits election speeches by employers or unions to massed assemblies of employees in the twenty-four hours leading up to an election. *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953). Such conduct causes an election to be set aside. *Id.* However, a strict definition of “massed assemblies” does not control this standard. That term is not “necessarily limited to all or most of the unit employees, or to any certain proportion of them, or to an assemblage of such employees whose votes would affect the outcome of the election.” *Great Atlantic & Pacific Tea Co.*, 111 NLRB 623, 626 (1955). Moreover, the objectionable electioneering does not have to be presented in any traditional format to set aside an election. For example, the Board found messages broadcasted by the union from a sound truck on a nearby street so that a minority of employees at the plant could hear them constituted impermissible electioneering. *U.S. Gypsum Co.*, 115 NLRB 734, 735 (1956). The Board there explained,

[A]lthough the employees were not a massed assembly in the sense that they were gathered for the purpose of hearing the speeches, the employees who heard or could have heard the speeches were not isolated, but were working with or near each other, and the Petitioner in a planned and systematic fashion directed its campaign speeches at the employees during the entire day before the election. Accordingly, as the considerations operative in establishing the *Peerless Plywood* rule are here present in substance, albeit not in form, we are persuaded to reach the same result here. Accordingly, we find that under all the circumstances, the Petitioner’s conduct occurring on the eve of the election tended

to destroy the freedom of choice of the employees and to establish an atmosphere in which a free election could not be held.

Id. at 735.

Petitioner's signs placed on property across from the polling place constituted impermissible propaganda and are analogous to prohibited electioneering. Not only did the large size of the signs immediately grab the attention of employees, but the fact that they appeared the day before the election magnified its effect. The surrounding community circumstances involving Proppant gave employees little time to process the message the signs conveyed. Proppant's objection to the signs is not displaced by *Midland National Life*, 263 NLRB 127 (1982) because it is not the substance of the propaganda that is at issue. Rather, the manner in which the sign appeared before voters is unlawful under the Board's standard. Further infringing on employee free choice was the fact that Fogel, a union representative, put up the sign (Hr'g Tr. 511:6-11) and was seen standing near it (Hr'g Tr. 218:9).

Further, like the Board observed in *U.S. Gypsum Co.*, 115 NLRB at 735, the *Peerless Plywood* rule considerations are present in substance because the Petitioner implemented a planned and systemic means of communicating with employees over the time leading up to the election. The signs stating community support should be seen as analogous to a pro-union speech in their delivery. Employees could not simply look away and disregard the message on Petitioner's largest sign because it was clearly visible to voters entering the polling location. As St. Clair testified, the signs were the "first thing" voters saw as they approached the polling place. (Hr'g Tr. 266:6-11.)

The signs sent a strong message of "community support" and were in close proximity to the polling place, similar to the sound trucks in *U.S. Gypsum Co.* that the Board determined to be impermissible electioneering. Moreover, the strategic placement of the signs

assured that all employees would receive the last-minute message from Petitioner as they converged on the polling place. This fact satisfies the “massed assembly” requirement to prohibit such communication.

Moreover, the fact that voters saw Fogel standing near the signs further contributed to the atmosphere of surveillance created by the Petitioner. Oliver recorded numerous conversations during the critical period through use of a handheld digital recorder. Shaw likewise testified to similarly recording conversations and explained it was to “protect himself.” The atmosphere of surveillance only grew when Fogel was seen on the property across from the polling place the day before the election. Further contributing to this atmosphere was the fact that other pro-union individuals stood in the parking lot as voters entered the polling place.

The Board should recognize that with less than twenty eligible employees in the unit, the ramifications of employees engaged in audio recording and other indicia of surveillance at Proppant are heightened compared to larger personnel environments and is analogous to employer surveillance. In this case, one employee recording conversations led to others engaging in similar activity to “protect” themselves. It is common knowledge that small devices that can digitally record are readily available and may be used without detection. Such a function is also accessible on the typical Smartphone. Once the idea of needing to record conversations is introduced in such a small environment, it is reasonable to infer most employee speech on this topic would be chilled for fear of any repercussions from discussing the possible representation. Moreover, this further magnifies the effects Oliver had on employees as the Night Shift Supervisor. He could speak more freely without fear of the potential adverse consequences that other employees felt from him.

Individually, the basis for each objection raised by the Employer is sufficient to set this election aside. Oliver could not serve as an observer for Petitioner without influencing employee choice. Oliver's conduct also impermissibly affected the free choice of employees. Further still, Petitioner's conduct placing signs across from the polling place and the atmosphere of surveillance that arose within the Oakdale facility all destroyed employee free choice. Combined, these actions and circumstances had devastating effects on the laboratory conditions necessary to conduct a fair election. As a result, the election should be set aside.

VII. CONCLUSION

For the reasons set forth above, the Employer respectfully submits its challenge and objection should be sustained, the results of the June 9, 2011 election set aside, and a new election ordered.

Dated: November 23, 2011

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:

PROPPANT SPECIALISTS, LLC,

EMPLOYER,

-and-

CASE NO. 30-RC-6783

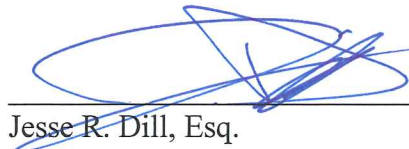
INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 139, AFL-CIO,

PETITIONER.

CERTIFICATE OF SERVICE

I, Jesse R. Dill, certify that on November 23, 2011, I caused to be filed in the above-captioned matter via electronic filing with the National Labor Relations Board a copy of **EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS AND OBJECTIONS WITH RECOMMENDATIONS.**

One copy of the above document is also being sent via U.S. Mail, to Pasquale Fioretto, Esq., Baum Sigman Auerbach & Neuman, Ltd., 200 West Adams Street, Suite 2200, Chicago, IL 60606.



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